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Supreme Court, U.S.
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No. 04-944

In The

Supreme Court of the United States

JENIFER ARBAUGH,

Petitioner,

vs.

Y & H CORPORATION, dba
THE MOONLIGHT CAFE,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

RESPONDENT'S BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE

Respondent is Y & H Corporation dba The Moonlight Cafe. There is no parent corporation and none of its shares are held by a publicly traded company.

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REASONS FOR DENYING THE WRIT

I. THIS COURT HAS ALREADY INDICATED THAT SECTION 701(b) OF THE 1964 CIVIL RIGHTS ACT (42 U.S.C. §2000e(b)) WHICH LIMITS THE DEFINITION OF "EMPLOYER" FOR TITLE VII PURPOSES TO THOSE WHO HAVE FIFTEEN OR MORE EMPLOYEES PRESENTS AN ISSUE OF SUBJECT MATTER JURISDICTION

Petitioner Jenifer Arbaugh presents this Court with the question of whether Section 701(b) of the 1964 Civil Rights Act, 42 U.S.C. §2000e(b), which defines "employer" as only those who have fifteen or more employees limits the subject matter jurisdiction of federal courts or only raises an issue going to the merits of a Title VII claim. Petitioner contends that this Court should grant writs in this matter primarily to resolve what she contends is a division in the circuit courts. While respondent will address below the degree to which such a division actually exists, respondent must begin with the fact that this Court has already indicated that this "numerosity" limitation is a jurisdictional requirement in *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202 (1998).

In *Walters*, the district court had dismissed a Title VII action for lack of subject matter jurisdiction upon the defendants' motion which contended that the defendant company did not employ fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year as required by §2000e(b). This Court granted a writ of certiorari directed to the Seventh Circuit Court of Appeals which had affirmed the district court's dismissal.

While the main issue which this Court addressed in *Walters* was whether an employer "has" an employee on days that the employee is employed but not working, this Court's treatment of the case reveals that it clearly viewed the employer definition contained in §2000e(b) as jurisdictional. In the unanimous opinion authored by Justice Scalia, this Court noted that defendants had filed and the district court had granted a motion to dismiss **for lack of subject matter jurisdiction**, which was upheld by the Court of Appeals. *Id.* at 204-205. Surely, if any of the justices on this Court had believed that the district and appellate courts had erred in addressing the employee numerosity requirement as a matter of subject matter jurisdiction, those justices would have so stated in either the Court's opinion or in concurring opinions.[1]

Even more revealing of this Court's acceptance of the jurisdictional nature of the numerosity requirement is the manner in which this Court remanded *Walters*. After concluding that the district court and the Seventh Circuit had used an improper method to calculate the number of weeks for which the defendant company satisfied the fifteen employee threshold, this Court examined the record and determined that the defendant company was an "employer" within the meaning of §2000e(b). *Id.* at 212. If,

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[1] The few appellate courts which accept petitioner's contention that a numerosity requirement is part of the merits of a plaintiff's employment claim had no difficulty independently correcting what they perceived to be a district court's incorrect invocation of subject matter jurisdiction. *See, e.g., Komorowski v. Townline Mini-Mart & Restaurant*, 162 F.3d 962 (7th Cir. 1998) and *Nesbit v. Gears Unlimited*, 347 F.3d 72 (3rd Cir. 2003) (both affirming the district court's dismissal of plaintiff's Title VII claim while stating that the district court erred in basing the dismissal on a lack of subject matter jurisdiction).

as petitioner contends, §2000e(b)'s requirement of fifteen employees was part of a Title VII plaintiff's claim on the merits rather than an element of subject matter jurisdiction, this Court would not have determined that the defendant company in *Walters* was an "employer" given that the plaintiff in *Walters* had not filed a motion for summary judgment on that issue. Rather, this Court would have remanded the matter with instructions that the trier of fact determine the numerosity issue and thus the defendant company's employer status based upon the methodology delineated in this Court's opinion.[2] Given that this Court preempted such an examination and instead determined the employer status of the defendant company in *Walters*, one can conclude that this Court viewed the issue as one of subject matter jurisdiction and thus, appropriate for judicial, rather than jury, determination.[3]

II. SEVERAL OF THE CIRCUIT COURTS WHICH PETITIONER CITES AS ADOPTING THE VIEW THAT THE REQUIREMENTS OF §2000e(b) ARE NOT JURISDICTIONAL HAVE NOT UNIFORMLY HELD THIS POSITION

In discussing the asserted conflict in the circuits, petitioner maintains that the Second, Third, Seventh,

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[2] Respondent agrees with petitioner that a plaintiff who has demanded a jury trial has the right to the jury's determination on the disputed elements of her claim. (Petition for Writ of Certiorari ("Pet.") at 20-21.)

[3] While the Third Circuit in *Nesbit v. Gears Unlimited*, 347 F.3d 72 (3rd Cir. 2003) referenced *Walters* in a footnote in its discussion of the case law addressing the jurisdictional vs. merits nature of §2000e(b), it ignored the fact that this Court did not remand the matter for a jury determination in deciding to discount the significance of *Walters*.

Eleventh and District of Columbia Circuits "insist" that the employee-numerosity requirements in federal statutes are not jurisdictional. While it is true that each of these circuits have issued opinions with such holdings, a review of the case law from the Seventh, Eleventh and District of Columbia Circuits reveals that any such insistence from these circuits is not very insistent.

From the Seventh Circuit, petitioner cites *Papa v. Katy Industries*, 166 F.3d 937 (7th Cir. 1999), *Komorowski v. Townline Mini-Mart & Restaurant*, 162 F.3d 962 (7th Cir. 1998), *Sharpe v. Jefferson Distributing Co.*, 148 F.3d 676 (7th Cir. 1998) and *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435 (7th Cir. 1996) for the non-jurisdictional nature of the numerosity requirement. In her Petition, however, petitioner recognizes that just five years prior to the first of these decisions, the Seventh Circuit had held such numerosity requirements to be jurisdictional in *Rogers v. Sugar Tree Products, Inc.*, 7 F.3d 577 (7th Cir. 1993).[4] Pet. at 12. Petitioner maintains that the Seventh Circuit expressly overruled *Rogers*, citing *Komorowski* and *Ost*. Neither the panel in *Komorowski* nor the panel in *Ost*, however, indicated that **they** were overruling *Rogers*. Rather, *Ost, id.* at fn. 1 (the earlier of these decisions) maintained that *Rogers* had been undermined by the court's decision in *EEOC v. The Chicago Club*, 86 F.3d 1423 (7th Cir. 1996). This seems unlikely, however,

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[4] "The mandate of the ADEA [Age Discrimination in Employment Act] only apply to businesses that employ twenty or more individuals. 29 U.S.C. §630(b). **For federal subject matter jurisdiction to exist**, the defendant must meet the definition of an employer as Congress set forth in §630(b)." *Rogers, id.* at 579 (emphasis added).

since *The Chicago Club* case did not even mention *Rogers* and did not involve a numerosity requirement.

From the Eleventh Circuit, petitioner cites *Morrison v. Amway Corp.*, 323 F.3d 920 (11th Cir. 2003) and the case upon which *Morrison* based its holding, *Garcia v. Copenhaver, Bell & Associates*, 104 F.3d 1256 (11th Cir. 1997). Between its decision in *Garcia* and its decision in *Morrison*, however, in *Scarfo v. Ginsberg*, 175 F.3d 957 (11th Cir. 1999), that court held that §2000e(b) established a jurisdictional requirement. Specifically, the Eleventh Circuit stated:

> Unless the appellees constitute an employer "who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year," Title VII is inapplicable and the district court lacks subject matter jurisdiction over Scarfo's claims.

Scarfo, id. at 961. *Scarfo* is completely consistent with the Eleventh Circuit's earlier decision of *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 932 (11th Cir. 1987) where the court held that a Title VII plaintiff must prove subject matter jurisdiction and an impediment to jurisdiction would be an inability to prove that their employer employed fifteen or more employees for the requisite time.

Finally, the District of Columbia's assertion in *EEOC v. St. Francis Xavier Parochial School*, 117 F.3d 621 (D.C. Cir. 1997) that §2000e(b) does not establish a jurisdictional requirement is undermined by a concurrence in that very case. In his concurrence, Judge Sentelle observed:

> I concur in my colleagues' carefully reasoned opinion but write separately only to express my

> misgivings about a point of previously established circuit law; that is, that the question of the number of employees goes to sufficiency of a complaint under Rule 12(b)(6) as opposed to jurisdiction, disposable under Rule 12(b)(1). I agree with the majority that *Haddon v. Walters*, 310 U.S.App.D.C. 63, 43 F.3d 1488 (D.C. Cir. 1995), impels us to treat this as a Rule 12(b)(6) question rather than a jurisdictional one. Although I served on the panel in *Haddon*, I have become increasingly convinced that *Haddon* was incorrectly decided. Again, as the majority notes, three other circuits have treated the employee numbering requirement drawn from the Title VII provision of *42 U.S.C. §2000(e) et seq.* as jurisdictional. *McKenzie v. Davenport-Harris Funeral Homes*, 834 F.2d 930, 932-33 (11th Cir. 1987); *Armbruster v. Quinn*, 711 F.2d 1332, 1335 (6th Cir. 1983); *Dumas v. Town of Mount Vernon*, 612 F.2d 974, 979-80 (5th Cir. 1980). While it is true, as the majority notes, that none of the courts discussed why the question is jurisdictional, I nonetheless believe they have it right. While it is also true, as the majority notes, that "nothing in Title VII (or the ADA) expressly limits the district court's subject matter jurisdiction," Maj. Op. at 5, to me it is more important that nothing in Title VII or the ADA *extends* the district court's jurisdiction to cases not involving the requisite number of employees. The federal courts being courts of limited jurisdiction, I believe that our sister circuits are correct in holding that cases without a sufficient number of employees fall outside.

Id. at 626.

Based upon the foregoing opinions from the Seventh, Eleventh and District of Columbia Circuits, respondent

respectfully suggests that the actual split on the interpretation of §2000e(b) is not between the circuits but instead between certain panels in certain circuits. Such discrepancies undoubtably merit resolution by the involved circuits en banc. They do not, however, merit this Court's involvement.

III. THE DECISION OF THE FIFTH CIRCUIT IN NO WAY CONFLICTS WITH ANY DECISION OF THIS COURT

Petitioner contends that the decision of the Fifth Circuit in this case conflicts with three decisions of this Court, namely, *Bell v. Hood*, 327 U.S. 678 (1946), *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) and *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). Petitioner is wrong with respect to each case.

Bell is clearly distinguishable from the issues presented herein. In *Bell*, the petitioners had instituted an action for monetary damages against agents of the Federal Bureau of Investigation contending that their rights under the Fourth and Fifth Amendments had been violated. Defendants sought and obtained dismissal for lack of subject matter jurisdiction contending that 1) petitioners were seeking damages for the state tort of trespass and not under the Constitution and 2) the district court lacked jurisdiction since the Constitution does not expressly provide for recovery of money damages for the violation of the Fourth and Fifth Amendments. On its review, this Court determined that petitioners' complaint clearly sought recovery under the Constitution, thus disposing of defendants' first argument. It was as to the second argument that this Court held that the possibility that plaintiff

might not have a cause of action upon which they might recover does not in itself defeat subject matter jurisdiction as the action still arose under the Constitution or laws of the United States.

Unlike *Bell*, where petitioners sought to protect Constitutional rights clearly subject to a federal court's review, petitioner herein seeks to protect rights of solely statutory creation. As such, Congress, in creating such rights, was free to limit the jurisdiction of the federal courts relative to such rights. As conceded by petitioner, at least six circuit courts (eight if the Seventh and Eleventh are included based upon the opinions referenced above), have determined that Congress decided to limit the jurisdiction of the federal courts in Title VII cases based upon the number of employees Pet. at 8. Given that all of these cases were decided after *Bell*, it is clear that the circuit courts did not view *Bell* as prohibiting such determinations.[5]

Petitioner also errs in contending that the Fifth Circuit's decision herein conflict with this Court's decision in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). *Steel Co.*'s discussion of jurisdiction addresses a statute of a type

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[5] Petitioner's *Bell* discussion also contains what respondent maintains is a misstatement of fact relative to the procedural history of this case. At page 15 of her petition, it is contended that the "*Bell v. Hood* standard is manifestly satisfied in a Title VII case **such as this in which a plaintiff alleges that the employer had the requisite fifteen employees**. . . ." (emphasis added). In fact, in her Complaint, petitioner never specifically alleged that respondent Y & H Corporation had fifteen or more employees and instead argued before the district court that respondent's Answer which admitted jurisdiction resolved the issued. App. at 46-48.

completely different from §2000e(b) numerosity requirement. The extent of the difference is demonstrated by the fact that petitioner does not compare 42 U.S.C. §11046(c), the object of *Steel Co.*'s attention, to §2000e(b) but rather to 42 U.S.C. §2000e-5(f)(3), the general jurisdictional statute found in Title VII.

Petitioner is further mistaken in attempting to apply *Steel Co.*'s admonition against reliance on drive-by jurisdictional rulings of this Court to the Fifth Circuit's decision in *Dumas v. Town of Mount Vernon*, 612 F.2d 974 (5th Cir. 1980). Clearly, this Court has the authority to determine what weight should be given to its cases and thus may admonish lower courts not to place undue weight on dicta contained therein. It would seem, however, that it is for the Fifth Circuit to decide how much weight it and its lower court should give to its decision in *Dumas*. Furthermore, petitioner's contention that the jurisdictional holding in *Dumas* was a casual remark ignores the fact that the Fifth Circuit was reviewing the district court's dismissal of the Title VII claims on subject matter jurisdiction grounds when other claims had been dismissed based on prescription or failure to state a claim upon which relief could be granted. *Dumas v. Town of Mount Vernon*, 436 F.Supp. 866 (S.D. Ala. 1977). Petitioner's speculation that the Fifth Circuit did not really mean that it was dismissing plaintiff's Title VII claims for lack of subject matter jurisdiction requires one to completely discount the district court's opinion.

The Fifth Circuit's decision herein is likewise not inconsistent with this Court's holding in *Zipes*. In determining in *Zipes* that Section 706(e) of Title VII which establishes the time limit for filing a charge with the EEOC was not jurisdictional, this Court examined both

the legislative history (which referred to Section 706(e) as a "time limitation") and the inferences to be drawn from prior cases where the Court had addressed Section 706(e). Petitioner makes no reference to legislative history with respect to §2000e(b) and the inferences to be drawn from the case where this Court previously addressed §2000e(b) run counter to petitioner's position. *See discussion of Walters, above.*

IV. THE DECISION OF THE FIFTH CIRCUIT POSES NO THREAT TO THE EFFICIENT AND PREDICTABLE CONDUCT OF CIVIL LITIGATION

At page 23 of her petition, petitioner makes the rather remarkable claim that "[b]y conflating the elements of a federal claim with the subject matter jurisdiction of the federal courts, the decision of the Fifth Circuit poses a serious threat to the efficient and predictable conduct of civil litigation." Given that the Fifth Circuit has held that the numerosity requirement is a jurisdictional one for 25 years, *Dumas v. Town of Mount Vernon*, 612 F.2d 974 (5th Cir. 1980), the Sixth Circuit has so held for 33 years, *Hassel v. Harmon Foods, Inc.*, 454 F.2d 199 (6th Cir. 1972), and the Ninth Circuit for 22 years, *Childs v. Local 18, International Brotherhood of Electrical Workers*, 719 F.2d 1379 (9th Cir. 1983), one must wonder why petitioner sees such a grave threat in a decision consistent with 25 years of circuit precedent.

With respect to petitioner's discussion of the impact that the jurisdictional nature of §2000e(b) can have on the course of litigation, respondent will not dispute that consequences naturally flow from a determination that a certain statutory requirement is jurisdictional. Petitioner

seems to ignore, however, that a plaintiff would be obligated to investigate prior to filing suit the number of employees that his employer had regardless of whether the question was jurisdictional or related to the merits. In either case, a plaintiff would understand that he would be obligated to prove that the defendant employer had the requisite number of employees for the requisite number of weeks in the given years. Thus, many of the potential problems relative to the numerosity jurisdiction issue would be avoided by simple pre-litigation investigation.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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